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IN THE

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTION PRESENTED

Given that a finding of "brandishing," as used in 18 U. S. C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Mandatory minimum sentencing provisions are an important tool to limit, but not eliminate, judicial discretion in sentencing. Overruling *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) would void hundreds, if not thousands, of state and

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

federal statutes and the important policy compromises behind them. Such a decision would also threaten many capital sentencing schemes, the Federal Sentencing Guidelines, and its state counterparts. This potential revolution in sentencing law is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant, William Joseph Harris, was a pawn shop owner in North Carolina. *United States* v. *Harris*, 243 F. 3d 806, 807 (CA4 2001). On April 29, 1999, an undercover law enforcement officer and an informant went to Harris' shop to purchase marijuana. See *ibid.* The agent talked with Harris, and then purchased a small amount of marijuana. The next day he purchased an additional 114 grams of marijuana. See *ibid.* Harris wore a 9mm pistol during both transactions. At one point, Harris took the weapon "from its holster and explained that it 'was an outlawed firearm because it had a high-capacity magazine,' and further stated that his homemade bullets could pierce a police officer's armored jacket." *Ibid.*

Harris was arrested and indicted on two counts of unlawful distribution of marijuana, see 21 U. S. C. § 841(a)(1) & (b)(1)(D), and two counts of carrying a firearm in relation to the marijuana offenses, 18 U. S. C. § 924(c)(1). See 243 F. 3d, at 807. Harris pled guilty to one marijuana count. The other marijuana count and one of the weapons counts were dismissed. Harris was convicted on the other weapons count after a bench trial. See *ibid.* At the sentencing hearing, the court held that Harris had "brandished" the pistol under 18 U. S. C. § 924(c)(1)(A)(ii) & (c)(4), and therefore sentenced him to the mandatory minimum term of seven years as prescribed by the statute. *Ibid.*

Harris appealed, and the Fourth Circuit Court of Appeals affirmed, holding that " 'brandished' is a sentencing factor, not an element of the offense." *Ibid.* The court held that *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) was contrary to defendant's argument and had not been overruled by *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). See 243 F. 3d, at 808-809. This Court granted certiorari on December 10, 2001.

SUMMARY OF ARGUMENT

Stare decisis is an important restraining influence in constitutional law. Reliance on precedent gives judicial decisions the impartiality, restraint, and predictability that makes them law rather than the rule of the majority of the current membership of the court. Following precedents thus restrains courts, and can provide the necessary neutral principles upon which to base judicial review. The fact that a precedent is constitutional does not negate the powerful *stare decisis* interests. The reasons for making the Constitution difficult to amend apply equally well to overrulings, which cautions this Court to act with considerable restraint in its constitutional cases.

Constitutional precedent is afforded a strong presumption of correctness by this Court. Rather than a mechanical formula or a mere policy expedient, *stare decisis* is an argument that must be confronted in every case. There must be some special compelling reason beyond the precedent's alleged incorrectness to justify overruling a constitutional decision.

The defendant cannot meet the heavy burden of finding some special justification for overruling *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986). Changed conditions have not undermined its precedential force, nor is *McMillan* unworkable. Although it did not precisely define the constitutional limits on the legislature's ability to allocate the burden of proof in criminal cases, this is far from fatal. The absence of bright-line rules does not diminish a precedent's value, as this Court's Fourth Amendment cases demonstrate. *McMillan* has not proven unworkable because Congress and the states have not abused their authority to define crimes and sentences.

The most substantial objection to *McMillan*'s continued validity, its alleged inconsistency with *Apprendi* v. *New Jersey*, 530 U. S. 446 (2000), fades upon careful analysis. *McMillan* is consistent with a large, coherent body of precedent. Nothing in the *Apprendi* majority opinion requires overruling *McMillan*. A clear distinction can be made between sentencing factors that exceed the statutory maximum and mandatory minimum sentences. Unlike the former, the mandatory minimum provisions in *McMillan* and this case do not create a new offense, and are therefore consistent with the *Apprendi* rule.

The precedential value of *McMillan* must take into account the enormous reliance interest in that decision. While this Court has stated that procedural cases have diminished reliance interests, not all procedural cases are alike. Because only the prosecution must defend its favorable judgments on appeal and on collateral attacks, the government has much greater reliance interests in this Court's procedural cases than criminal defendants.

The reasonable doubt decisions create an even higher reliance interest for government. They involve the heart of the legislative function, defining and punishing crimes. Removing one strand of the intricate web of crime and punishment can cause the whole structure of policy compromises to unravel. Mandatory minimum provisions are an integral part of countless sentencing schemes and the hundreds, if not thousands, of mandatory minimum provisions threatened in this case reflect the compelling reliance interest in *McMillan*.

A final problem with overruling *McMillan* is containing the impact of such a decision in a principled manner. The rationale for such a decision would be that any factor that causes an increase in punishment would have to be proven beyond a reasonable doubt to a jury. This would threaten the rationale of *Walton* v. *Arizona*, 497 U. S. 639 (1990) and a host of other capital sentencing decisions. It would also seriously threaten the Federal Sentencing Guidelines and their state counterparts. Any attempt to contain this damage through *stare decisis* would

appear arbitrary if *McMillan* were overruled. Retaining *McMillan* allows the Court to avoid the unpleasant choice between arbitrariness and a potential revolution in sentencing law.

ARGUMENT

The right of legislatures to define criminal conduct and limit judicial discretion in sentencing is threatened in this case. In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), this Court upheld against constitutional attack a Pennsylvania statute which provided that "anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." *Id.*, at 81. The decision rejected the notion that every fact linked to an increase or decrease in punishment was subject to the reasonable doubt standard. See *id.*, at 84. Because this provision could reasonably be considered a sentencing factor rather than an element of the crime, the due process reasonable doubt requirement was not violated. See *id.*, at 89-90.

The defendant asserts that under *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), the Constitution requires that the brandishing provision of 18 U. S. C. § 924(c)(1)(A) must be proven beyond a reasonable doubt. See Brief for Petitioner 27-30. A necessary part of this argument is that *McMillan* should be overruled, as it has been undermined by *Apprendi*. See *id.*, at 40-45.

The immediate impact of overruling *McMillan* would be momentous itself, as the numerous sentencing statutes enacted in reliance on this decision would be invalidated. In order to overrule *McMillan*, *Apprendi* must be read very broadly. Such a broad reading would dramatically expand judicial review of sentencing schemes and the statutory definition of crimes. In addition to *McMillan*, several other of this Court's precedents,

the Federal Sentencing Guidelines, and their state counterparts are threatened by the defendant's proposed expansion of *Apprendi*. That result would be a "colossal" upheaval for the criminal justice system. See *Apprendi*, 530 U. S., at 551 (O'Connor, J., dissenting).

Apprendi need not and should not be read so broadly as to overrule *McMillan*. In addition to strong *stare decisis* reasons for keeping *McMillan*, *Apprendi* can be interpreted in an appropriately narrow manner that best preserves *McMillan* and other precedents. This is the least disruptive and most natural reading of *Apprendi*.

1. *Stare decisis* is an important restraining influence in constitutional law.

Although occasionally minimized as a dispensable, judicially-created construct, *stare decisis* is part of the law's lifeblood. Reliance on precedent gives judicial decisions the impartiality, restraint, and predictability that makes them law rather than personal whim. While *stare decisis* may have less influence in constitutional than in statutory cases, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), it is still a vital and important restraint in constitutional cases. An examination of the *stare decisis* principle's rationale and its treatment by this Court demonstrates its importance to the present case.

A. The Rationale.

There are many reasons for courts to follow precedent. Perhaps the most important reason is judicial restraint. Relying on earlier decisions helps insure that decisions are based on the rule of law rather than the rule of the majority of current membership of the Court.

> "The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652 (1895) (White, J., dissenting), overruled in *South Carolina* v. *Baker*, 485 U. S. 505, 524 (1988).

While stability, reliance, and other factors are all important reasons for following precedent, Justice White's dissent points at the overall effect of the doctrine. Relying on the decision of prior courts is an effective restraint upon current and future courts. A constant problem with judicial review is finding neutral principles upon which to base constitutional decisions. If the Court is to be more than a "naked power organ," then its decisions must be controlled by principle. See H. Wechsler, Toward Neutral Principles of Constitutional Law, in Principles Politics and Fundamental Law 3, 27 (1961). "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." *Ibid.*

Precedent is a worthy neutral principle in most cases. "Stare decisis helps reduce this 'counter-majoritarian difficulty' [of judicial review] by requiring the Court to specially justify any overruling decisions, thereby allaying suspicion that the Justices base their decisions upon personal preferences." Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344, 1350 (1990) (footnotes omitted). This convinced the Founders when they established the Judicial Branch. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." The Federalist No. 78, p. 471 (C. Rossiter

ed. 1961) (A. Hamilton). This view also reflects the common law's heavy reliance upon *stare decisis*. See *Rogers* v. *Tennessee*, 532 U. S. 451, 473, and n. 2 (2001) (Scalia, J., dissenting).

This Court is similarly disposed towards judicial restraint. "That doctrine [*stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986). Justice Powell expressed similar sentiments. "But the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law." Powell, Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281, 288 (1990).

Insufficient respect for *stare decisis* thus threatens the public legitimacy of the Court and its decisions. Adherence to precedent helps assure the public that the Court rules impartially. See Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 2 (1983). A perception that places the "adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and this train only," *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting), can only add to the unfortunate public cynicism about the political nature of constitutional law. See Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum L. Rev. 723, 753 (1988).

Judicial restraint is a theme that runs through the traditional rationales for *stare decisis*. The common justifications for adhering to precedent—reliance, equality, and efficiency—are all closely related to judicial restraint. By assuring the public that judges will rule impartially, *stare decisis* allows individuals to order their affairs around precedents. See Stevens, *supra*, 58 N. Y. U. L. Rev., at 2. Equality is also served, as restraining judges through precedent ensures that similar cases will be treated similarly, rather than according to idiosyncracies of the

individual judges. *Id.*, at 2-3, n. 12 (quoting W. Douglas, Stare Decisis 8 (1949)). Even efficiency, the idea that precedents relieve judges of the task of having to reinvent the wheel with each new decision, see B. Cardozo, the Nature of the Judicial Process 149-150 (1921), is a form of judicial restraint. Efficiency is advanced through reliance on precedent by allowing the judge to defer to the accumulated wisdom of his or her predecessors. See Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 422-423 (1988). "Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem." *Id.*, at 423.

This "conservative, stabilizing force," see Monaghan, 88 Colum. L. Rev., at 751, plays an important role in restraining constitutional decisions. Although this Court has stated that *stare decisis* is less important in constitutional cases because the Constitution is so difficult to amend, see, *e.g.*, *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997), *stare decisis* is much more than an easily dispensable policy in constitutional cases. If anything, stability is needed even more in our most important body of law.

Two reasons why the Constitution is difficult to amend are because the Framers sought to "ensure that a super-majority of the people supports any constitutional rule . . . at the time of inception" and "to ensure stability in the structure of government." Easterbrook, 73 Cornell L. Rev., at 430. Weakening precedent in constitutional cases frustrates both values. "People who seek amendment know that the Court may change the rules at any moment, making their campaign unnecessary or even counterproductive (depending on the new rules the Court supplies). . . . The Court's emphasis on the difficulty of amending the Constitution therefore may lead paradoxically to an increased difficulty in securing a change." *Id.*, at 430-431.

The instability caused by frequent overruling of constitutional precedent is equally apparent. See *id.*, at 431. "Precisely

because constitutional rules establishing governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings." *Ibid.* (emphasis in original).

While it is too late to elevate constitutional *stare decisis* in relation to its statutory counterpart, constitutional precedents still deserve considerable respect. If we are to "contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum," see Monaghan, 88 Colum. L. Rev., at 753, then the Court must act with considerable restraint in its constitutional cases. That restraint is best served by a strong presumption in favor of adhering to precedents, even in constitutional cases. This principle finds considerable support in this Court's precedents.

B. Stare Decisis and the Constitution.

While *stare decisis* may have more strength in statutory cases, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), constitutional precedent is still afforded a strong presumption of correctness by the Court. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). *Stare decisis* is the normal state of affairs in this Court's decisions. Out of the thousands of cases on its docket "over and over again the Court's action involves nothing more than the application of old precedent to a new controversy." Stevens, 58 N. Y. U. L. Rev., at 4. At most, two to three decisions each year involve overruling precedents. As the ever-increasing complexity of the law creates more opportunities for precedents to conflict, this small proportion of overrulings demonstrates the continuing vitality of *stare decisis*. See *id.*, at 4-5. Indeed, overruling a precedent, even a constitutional one, is an "exceptional action." *Rumsey*, 467 U. S., at 212.

Rather than a mechanical formula or a mere policy expedient, *stare decisis* is an argument that must be confronted in every case.

> "It is possible, without talking about the need for predictability, the fact of reliance, the prevention of legal error, and the like, to notice that when viewed as *reasons*, precedents by themselves constitute justifications that require confrontation before they may be sensibly disregarded or altered. . . . As such, they carry their own prima facie claim for acceptance." R. Wasserstrom, The Judicial Decision 83 (1961) (emphasis in original).

The doctrine carries a substantial "persuasive force," in every case. See *Payne*, 501 U. S., at 842 (Souter, J., concurring). Therefore, where the law is settled "we should stick to it absent some compelling reason to discard it." *Lee* v. *Weisman*, 505 U. S. 577, 611 (1992) (Souter, J., concurring).

Dickerson v. *United States*, 530 U. S. 428 (2000) provides an example of these principles in action. Although *Miranda* v. *Arizona*, 384 U. S. 436 (1966) might have been decided differently by the members of the *Dickerson* Court, this decision was not overturned in spite of a longstanding invitation to do so from Congress. "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson*, *supra*, at 443. As in *Rumsey* and other cases, departure from this constitutional precedent required some "special justification." See *ibid.* (internal quotation marks omitted). Following Justice Souter's concurrence in *Payne*, this is derived from the inherent persuasive force of precedent. See *ibid.*

The *Dickerson* Court did not overrule *Miranda* in spite of strong reasons for overturning the decision. *Miranda* was decided over spirited dissents and remains controversial to this day. As the dissents noted, it was "poor constitutional law," *Miranda*, 384 U. S., at 504 (Harlan, J., dissenting), and was

devoid of historical support. See *id.*, at 526 (White, J., dissenting). The *Miranda* test had its own administrative difficulties, and more importantly, extracted a fearful societal toll in suppressed voluntary confessions. In addition, it was based on a faulty premise, that police interrogation practices too often failed to comply with Fifth Amendment and Due Process requirements. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1443-1444 (1985). Yet *Miranda* was not overruled. The warnings had found wide acceptance in our culture, while subsequent decisions had reduced *Miranda*'s impact on law and reaffirmed its core values. See *Dickerson*, 530 U. S., at 443-444. Additionally, *Miranda* was as workable as the alternative, "the totality of the circumstances test" of 18 U. S. C. § 3501. See *id.*, at 444.

Society had developed expectations around *Miranda*, the decision was not undercut by subsequent developments in the law, and it worked. These principles form the basis of most of this Court's constitutional *stare decisis* analysis. This Court generally does not overrule a case unless at least one of three reasons are present: "changed conditions, the lessons of experience (including unworkability), and conflicting precedents." Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 109 (1991). The strength of *stare decisis*' presumption of correctness, see Stevens, 58 N. Y. U. L. Rev., at 8, is influenced by additional factors. The reliance interest in a precedent plays an important role in determining how much justification is necessary to overcome the presumption of correctness. For example, decisions limiting the prosecution's case in the sentencing phase of capital trials had diminished *stare decisis* protection as there was no legitimate reliance interest in those decisions. See *Payne*, 501 U. S., at 828. When overturning a decision would "risk . . . undermining public confidence in the stability of our basic rules of law," see Stevens, 58 N. Y. U. L. Rev., at 9, then the argument for following the precedent is strengthened.

Although these factors guide the Court's analysis, there is no simple formula for determining the strength of a precedent.

> "Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986).

If *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) is to be overruled, it is not enough to simply claim that the case was wrongly decided. At the very least, *McMillan* must be proven "to be unworkable or to conflict with later doctrine or to suffer from the effects of facts developed since its decision (apart from those indicating its original errors)." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 183 (1996) (Souter, J., dissenting). Even if there is some special justification for departing from *McMillan*, sufficiently strong reliance interests or the public's confidence in the stability of our system may yet preserve the case. In light of these significant hurdles, there is no case for extending *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) to overrule *McMillan*.

II. The defendant cannot meet the heavy burden of finding some special justification for overruling *McMillan*.

Extending *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) to overrule *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) is not justified under any principled application of *stare decisis*. *McMillan* is not "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." See *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986). Other facts only strengthen *McMillan*'s value as precedent. Numerous mandatory minimum statutes have been enacted in reliance on *McMillan*. The invalidation of these statutes and the further

disruption of sentencing law that would attend this expansion of *Apprendi* threaten to erode public confidence in the law and this Court's decisions.

A. No Special Reasons.

None of the three most common reasons for departing from precedent—changed conditions, unworkability, or conflicting precedents, see Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 109 (1991); see also *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854-855 (1992)—apply to *McMillan*. No new circumstances have undermined *McMillan*. An illustration of this ground is found in *Propeller Genesee Chief* v. *Fitzhugh*, 12 How. (53 U. S.) 443 (1852). That case involved a technological innovation. The invention of the steamboat and the subsequent commercial development of inland rivers had effectively changed the definition of public navigable river, and therefore the limits of the admiralty power. See *id.*, at 455-457. The decision relying on the now-obsolete definition, *The Steamboat Thomas Jefferson*, 10 Wheat. (23 U. S.) 428 (1825), had to be overruled. See *Propeller Genesee*, *supra*, at 456. The only significant change since *McMillan*, the many mandatory minimum sentencing statutes enacted in reliance on that decision, see part II B, *infra*, only strengthens its precedential value.

Nor is *McMillan* unworkable. While some may disagree with the desirability of mandatory minimum sentences, their execution is comparatively straightforward in the context of modern sentencing law. The only possible difficulty in administering *McMillan* is its recognition that the Constitution still prevented legislatures from evading the reasonable doubt standard by manipulating the distinction between the underlying offense and the sentence. The *McMillan* Court did not "define precisely . . . the extent to which due process forbids the reallocation or reduction of burden of proof in criminal cases . . . ." 477 U. S., at 86. An imprecise exception to a general

rule does not render the rule unworkable. If simple imprecision determined a rule's practicality, then *stare decisis* would virtually cease to exist in a Fourth Amendment jurisprudence driven by a reasonableness standard. Cf. *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652-653 (1995) (reasonableness standard); *Michigan* v. *Chesternut*, 486 U. S. 567, 572-573 (1988) (eschewing "bright-line" rules in seizure cases). "Our inability to lay down any 'bright-line' test may leave the constitutionality of statutes more like those in *Mullaney* [v. *Wilbur*, 421 U. S. 684 (1975)] and *Specht* [v. *Patterson*, 386 U. S. 605 (1965)] than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." *McMillan*, 477 U. S., at 91.

The *McMillan* standard has not proven unworkable, because Congress and the states have not abused their authority to define crimes and sentences. Legislatures do not strip out the elements from crimes and convert them into mandatory minimum factors to be proved by a preponderance of the evidence at the sentencing phase. While there may be many mandatory minimum sentencing statutes, see part II B, *infra*, they have not pushed the edge of what is permissible under *McMillan*. *McMillan*'s generally deferential standard poses no administrative problems.

The most substantial objection to *McMillan*'s continued validity, its alleged inconsistency with *Apprendi*, fades upon careful analysis. *McMillan* is not an aberrant departure from settled practice. Rather it is part of a large and ongoing body of law recognizing that legislatures have considerable, but not unlimited, leeway in defining crimes and punishments. The *McMillan* line begins with *Patterson* v. *New York*, 432 U. S. 197 (1977). *Patterson* reflected the necessity of giving legislatures considerable leeway in defining crimes. While the historical treatment of defenses to homicide was relevant to its analysis of placing the burden of proof for the severe emotional stress defense, see *id.*, at 202-203, the structure of New York's

homicide law was critical to finding no due process violation. Because the statute providing the affirmative defense did not change the prosecution's burden of proving the elements of murder beyond a reasonable doubt, there was no due process violation. See *id.*, at 205-206. The Constitution was satisfied because "[i]t is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances." *Id.*, at 206. Finally, the *Patterson* decision provided further justification for *McMillan* when it dismissed the argument that *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975) required the State "to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' " See *Patterson*, *supra*, at 214, n. 15.

McMillan flowed from this decision. There was no due process violation because the mandatory minimum sentence provision did not change the prosecutor's burden of proving the underlying crime. Since the sentencing provision was not an element of the underlying offense, *Patterson* controlled. See *McMillan*, 477 U. S., at 85-86. *McMillan* was thus not an aberration, but rather the logical extension of *Patterson*'s deference to the States and Congress.

McMillan was not viewed as an aberration after it was decided. This Court has consistently relied on *McMillan*. In *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*), this Court relied on *McMillan* to hold that the Sixth Amendment did not require the jury to specify the aggravating factors that permit the jury imposition of capital punishment in Florida. As in *McMillan*, the "aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' " *Id.*, at 640 (quoting *McMillan*, 477 U. S., at 86). In *Clemons* v. *Mississippi*, 494 U. S. 738, 746 (1990), *McMillan* and *Hildwin* were invoked to support the holding that the Sixth Amendment did not invalidate a death sentence where an appellate court had invalidated one of the aggravating factors, but affirmed the death sentence after finding that the remaining aggravating

factors outweighed the mitigating evidence. See *id.*, at 745-746. *Hildwin* and *Clemons* were in turn invoked to uphold, against a Sixth Amendment challenge, an Arizona law allowing the court to determine the aggravating fact necessary for eligibility for the death penalty. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990). *McMillan* is also important in non-capital sentencing. *Witte* v. *United States*, 515 U. S. 389, 391 (1995) addressed whether the Double Jeopardy Clause prevented a court from "convicting and sentencing a defendant for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction." *McMillan* was cited as one of several cases that "reinforce our conclusion that consideration of information about the defendant's character and conduct at sentencing did not result in 'punishment' for any offense other than the one for which the defendant was convicted." *Id.*, at 401.

Up to *Apprendi* and its nonconstitutional precursor, *Jones* v. *United States*, 526 U. S. 227 (1999), *McMillan* was important and unquestioned. While *Apprendi*'s historical, formalistic approach can be read to create analytical difficulties for *McMillan*, this does not rise to the level of inconsistency that justifies the dramatic step of overruling a precedent. *Apprendi* specifically declined to overrule *McMillan*, reserving that issue for another time. See 530 U. S., at 487, n. 13. Instead, the *Apprendi* Court chose not to give an expansive reading to *McMillan*. "We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself." *Ibid.*

As this suggests, *McMillan* and *Apprendi* can coexist in the same body of precedent. A clear analytical distinction can be drawn between statutes that limit court's discretion *within* the range of statutorily defined sentences for the crime, as in *McMillan* and the present case, and the situation in *Apprendi*,

where the sentencing factor allowed the judge to give a sentence for a crime that is *higher* than one described in the statute.

Another *Apprendi* footnote further supports retaining *McMillan*. Although the *Apprendi* Court questioned the historical basis of *McMillan*'s use of the term "sentencing factor," see *id.*, at 485, 494, n. 19, it recognized that this term had meaning. "The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Id.*, at 494, n. 19 (emphasis in original). By increasing the maximum possible sentence, the hate crime "sentencing factor" in *Apprendi* created the "functional equivalent" of a new "greater offense," see *ibid.*, effectively distinguishing itself from *McMillan*'s mandatory minimum.

This distinction is crucial to the *Apprendi* decision. In addition to its historic basis, *Apprendi* also serves "powerful interests" in the way it protects due process and the right to jury trial. See *id.*, at 495. "The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." *Id.*, at 495.

Apprendi is thus best read as a structural decision. Whenever a legislature enacts a new crime it makes a policy decision. *Apprendi* holds that this decision cannot be hidden under the guise of a "sentencing factor." As the majority noted:

> "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged 'to make its choices concerning the substantive

> content of its criminal laws with full awareness of consequences, unable to mask substantive policy choices' of exposing all who are convicted to the maximum sentence it provides." *Id.*, at 490-491, n. 16 (emphasis in original) (quoting *Patterson*, 432 U. S., at 228-229, n. 13 (Powell, J., dissenting)).

This passage also demonstrates that *McMillan*'s continued existence will not eviscerate the *Apprendi* rule. Contrary to the defendant's arguments, see Brief for Petitioner 37-39, legislatures will not craft baroque evasions of *Apprendi* through the use of mandatory minimums, because neither the States nor Congress play games with the criminal law. While legislatures have had little time to respond to *Apprendi*, history demonstrates that the *Apprendi* majority was correct to place its faith in the collective wisdom of our political representatives.

The response to *Patterson* is illuminating. The States and Congress have not come close to pushing the limits of *Patterson*'s deference to legislative definition of affirmative defenses. Contrary to fears of the *Patterson* dissenters that legislatures would shift elements of crime to affirmative defenses, see *Patterson*, 432 U. S., at 223, 224 (Powell, J., dissenting), "the worst never actually occurred." See Hoffman, *Apprendi v. New Jersey*: Back to the Future?, 38 Am. Crim. L. Rev. 255, 272 (2001). Aside from the insanity defense, very few criminal statutes have been rewritten to take advantage of *Patterson*. See *id.*, at 272-273. Even after *Martin* v. *Ohio*, 480 U. S. 228, 233 (1987) in which the state was allowed to shift the burden of proof of self-defense to the defendant, legislatures still did not exploit this newly won freedom and attempt to strip the traditional elements from crimes by placing them in new affirmative defenses. See Hoffman, 38 Am. Crim. L. Rev., at 273-274.

Apprendi's holding is clearly stated in a reference it makes to *McMillan*. "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a

tail which wags the dog of the substantive offense.' " *Apprendi*, 530 U. S., at 495 (quoting *McMillan*, 477 U. S., at 88). The *Apprendi* majority recognized that not every fact which influences a sentence has to be determined by a jury. "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating to the offense and the offender—in imposing sentence within the *range* prescribed by statute." *Id.*, at 481 (emphasis in original). As *Apprendi*'s analytical predecessor stated, "It is not, of course, that anyone today would claim that every fact bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." *Jones*, 526 U. S., at 248. *McMillan* and other legislative efforts to guide judicial sentencing discretion through mandatory minimum sentences are consistent with these principles.

Any actual tension between *McMillan* and *Apprendi* relates to their respective reliance on history. The *Apprendi* decision did place significant emphasis on the fact that, historically, facts that increased the maximum sentence for the crime were treated as elements that had to be pled and proved before a jury. See 530 U. S., at 477-483. The mandatory minimum schemes of *McMillan* and the present case have no clear historical precedents. Neither the common law nor 19th century practice guided the sentencer's discretion in the manner contemplated by modern practice. See King & Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1474-1477 (2001). The fact that there is no historical analog does not itself constitute a due process violation. See *Apprendi*, 530 U. S., at 483; *Hurtado* v. *California*, 110 U. S. 516, 529 (1884) (holding all procedural change unconstitutional "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement"). Whatever historical tension that may exist between *McMillan* and *Apprendi* is not enough to render them incompatible.

Apprendi did not directly contradict *McMillan*. Nor has it fatally undermined *McMillan*'s premises. Cf. *Agostini* v.

Felton, 521 U. S. 203, 226 (1997) ("premises on which we relied . . . no longer valid"). This Court has countenanced far greater tension between its precedents without resorting to the drastic step of overruling one of its decisions. See, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring) (discussing tensions between Eighth Amendment guided discretion and mitigating circumstance cases); *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (describing tensions between *Rummel* v. *Estelle*, 445 U. S. 263 (1980) and *Solem* v. *Helms*, 463 U. S. 277 (1983)). While the *Apprendi* majority might have reached a different conclusion had it addressed the *McMillan* issue in the first instance, that does not justify overruling *McMillan*. See *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). *McMillan*'s "underpinnings [are] unweakened in any way affecting its central holding." See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 860 (1992). It is not unworkable, it is not "at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered [the statutory maximum for the offense] more or less appropriate as the point at which the balance of interests tips." See *id.*, at 860-861. In short, there are no special reasons for overruling *McMillan*.

B. Reliance.

The precedential value of *McMillan* must take into account the enormous reliance interest in that decision. Cf. *Apprendi*, 530 U. S., at 487, n. 13 (recognizing reliance interest in *McMillan*). Although this Court has stated that procedural and evidentiary cases warrant less *stare decisis* protection due to the diminished reliance interests in them, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), all procedural cases are not alike. It is true that criminal defendants rarely have any legitimate reliance interest in decisions granting them procedural rights. For example, no individual can in any reasonable sense rely on a rule limiting the use of victim impact evidence in the sentenc-

ing phase of a capital murder trial. Cf. *id.*, at 818-819 (describing *Booth* v. *Maryland*, 482 U. S. 496 (1987) and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989)); *id.*, at 828 (lack of reliance interest).

Criminal defendants have far less reliance interests in precedents than the government due to the asymmetrical appellate rights of the two. Only the prosecution needs to defend its judgments on appeal or collateral attack. A defendant who relies on an existing procedure at trial is acquitted, and the Double Jeopardy Clause protects him from reversal on appeal. Only in exceedingly rare instances, such as the use of immunized testimony, could a defendant have a legitimate reliance interest.

Governments, however, can and do rely on this Court's procedural decisions. Police officers will rely on this Court's sanction for interrogation or search practices, and prosecutors will develop cases, present evidence, and file charges based on procedural decisions. The reasonable doubt decisions create an even higher reliance interest.

These decisions typically involve basic regulation of human conduct, whether through the definition of murder and manslaughter, see *Mullaney* v. *Wilbur*, 421 U. S. 684, 691-692 (1975), defenses to murder, see *Patterson* v. *New York*, 432 U. S. 197, 200-201 (1977), or the punishment for crimes, see *McMillan*, 477 U. S., at 81; *Apprendi*, 530 U. S., at 474. Defining and punishing crime lies at the heart of the legislative function. As the *Patterson* Court noted, dealing with crime is primarily a state prerogative and therefore "we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." 432 U. S., at 201. In the federal system, Congress has the predominant role defining and punishing crimes. See *United States* v. *Hudson*, 7 Cranch (11 U. S.) 32, 34 (1812) (no federal common law criminal jurisdiction); *Staples* v. *United States*, 511 U. S. 600, 604-605 (1994). As individual security is the most important government function, see *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983), the government reliance is particularly important when defining and punishing crime.

These essential policy decisions are not discrete. The definition of a particular crime, its lesser and greater offenses, any defenses, and all relevant punishment statutes form a closely interrelated web of policy decisions. Remove a strand, and the entire web of compromises threatens to unravel.

A mandatory minimum sentence provision is not some easily discarded excess component of a statute. It is "a form of determinate sentencing designed to control the discretion of judges and parole boards and advance the goals of deterrence and incapacitation." 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.3(c), p. 735 (2d ed. 1999). If *McMillan* is overruled, then the relationship that Congress and the state legislatures set between crime and punishment is broken for those punishments containing mandatory minimum provisions. The calculus between culpability and desert will have to be recalibrated. Lacking this tool to limit judicial discretion, legislatures might revert to strictly determinate sentencing. They might change the sentences for the crime, or they may create a new crime with the triggering event for the mandatory minimum.

No matter how Congress and the states respond, overruling *McMillan* will undo carefully built compromises between culpability, punishment, and judicial discretion made in reliance on this Court's precedents. Since *McMillan* is almost 16 years old, many legislative decisions have been made in reliance on this decision. *Amicus* will not recount in detail the hundreds, if not thousands of mandatory minimum provisions threatened by overruling *McMillan*, other than noting that all 50 states have mandatory minimum provisions, and that one recent survey listed over 60 mandatory minimum provisions for federal crimes. See *id.*, § 26.3(c), at 736 & n. 14.

Apprendi has already caused considerable disruption to the criminal justice system. "In the year since the Court's opinion,

more than four hundred federal and state court decisions have dealt with *Apprendi* issues, and a recent article in the Federal Sentencing Reporter listed forty-eight federal statutes that either have been or may soon be challenged under *Apprendi*." Hoffman, *Apprendi v. New Jersey*: Back to the Future? 38 Am. Crim. L. Rev. 255, 255 (2001) (footnotes omitted); King & Klein, *Apres* Apprendi, 12 Fed. Sent. Rep. 331, 336-338 (2000) (Appendix A) (listing federal statutes threatened by *Apprendi*). Such disruption was tolerable because Congress and the states did not enact these provisions in reliance on a precedent of this Court. Although the vigorous and well-reasoned *Apprendi* dissents showed that a strong case could be made for their constitutionality, these sentencing provisions never had the explicit sanction of this Court. Indeed, even the *McMillan* decision recognized that sentencing factors that authorized exceeding the statutory maximum sentence raised a more significant constitutional issue than the mandatory minimum it upheld. See *McMillan*, 477 U. S., at 88.

Where countless statutes involving the most important government action have been enacted in reliance on a Supreme Court decision directly on point, then the *stare decisis* protection for that decision is deservedly substantial. Mandatory minimums may not be universally popular, but that is not enough to justify overturning *McMillan*. The combination of substantial reliance and lack of any special reason for overturning *McMillan* make a compelling case for retaining this decision. Any remaining doubts about *McMillan*'s continued validity are resolved by considering the effect such a decision would have on other parts of the law.

III. Overruling *McMillan* would be difficult to contain in a principled manner.

A final problem with overruling *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) is containing the impact of such a decision in a principled manner. While overruling *McMillan* would

itself create enormous disruption, see part II B, *ante*, at 21, the threat to sentencing law is not confined to invalidating mandatory minimum sentencing schemes. The reasoning behind any decision striking down *McMillan* would necessarily implicate many other aspects of sentencing, including some death penalty systems and the Federal Sentencing Guidelines.

As there is nothing fundamentally inconsistent between *McMillan* and a normal reading of the narrow rule of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), see *ante*, at 17-20; King & Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1478 (2001), the analytical force for overruling *McMillan* must come from outside the four corners of the *Apprendi* majority opinion. The potential sources for departing from the *McMillan* rule are the *McMillan* dissents and Justice Thomas' *Apprendi* concurrence. Each of these opinions would, if adopted by a majority of this Court, considerably expand the scope of the Due Process Clause with respect to the legislative power to define and punish crimes.

The narrowest expansion of due process comes from Justice Stevens' dissent in *McMillan*. This opinion would hold that

> "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship* [397 U. S. 358 (1970)]." *McMillan*, 477 U. S., at 103 (Stevens, J., dissenting).

Justice Marshall's dissent left open the possibility that mitigating facts might also be subject to *Winship*'s reasonable doubt requirement. See *id.*, at 94 (Marshall, J., dissenting). Justice Thomas' concurrence in *Apprendi* draws from 19th century and common law treatment of the elements of crime, and reaches a result similar to Justice Stevens' dissent in *McMillan*.

> "This authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). . . . One

need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled to for a given set of facts. Each fact necessary for that entitlement is an element." *Apprendi*, 530 U. S., at 501 (Thomas, J., concurring).

At the very least, *Walton* v. *Arizona*, 497 U. S. 639 (1990) and *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998) would be endangered under any of these approaches. *Walton* held that having a judge rather than a jury find the aggravating factor necessary for death penalty eligibility did not violate the Sixth Amendment. See 497 U. S., at 649. The *Walton* Court rejected the defendant's claim that " 'the Constitution requires that a jury . . . make the findings prerequisite to imposition of' " the death penalty. *Id.*, at 647 (quoting *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)). This holding is difficult to square with any of the opinions advocating the overruling of *McMillan*. It is possible that the special requirements imposed on the states by this Court's Eighth Amendment cases might justify distinguishing *Walton* from a broad reading of *Apprendi*. See 530 U. S., at 523 (Thomas, J., concurring). Since this would involve treating capital defendants less deferentially than noncapital convicts, the distinction would be strained.

At the very least, *Walton* will be seriously threatened. If it is overruled, it is difficult to see how the other capital cases relying on *McMillan*, *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*) and *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), see *ante*, at 16-17, could withstand this tide.

Noncapital sentencing would also be upset by a decision overturning *McMillan*. All of the approaches advocating the removal of *McMillan* would likely sweep away *Almendarez-Torres*. The fact that prior criminal conduct is a fact traditionally relegated to sentencing, see 523 U. S., at 243-244, does not change the fact that in *Almendarez-Torres* recidivism was used to increase the maximum sentence, *id.*, at 226, and therefore would have to be an element of the crime. See *Apprendi*, 530 U. S., at 521 (Thomas, J., concurring).

More importantly, the Federal Sentencing Guidelines and their state counterparts would be threatened by an opinion overruling *McMillan*. The Guidelines are permissible under the narrow rule of the *Apprendi* majority because the sentencing matrix is never invoked to increase a punishment beyond the statutory maximum. See Priester, Constitutional Formalism and the Meaning of *Apprendi* v. *New Jersey*, 38 Am. Crim. L. Rev. 281, 290 (2001). However, if any fact that increases a punishment within the prescribed range of punishments must also be treated as an element, then the Guidelines are in serious jeopardy. See King & Klein, 54 Vand. L. Rev., at 1483-1484. The *McMillan* opponents assert that the mandatory minimum enhancement was an element because

> "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum 'entitl[es] the government' . . . to more than it would otherwise be entitled (5 to 10 years rather than 0 to 10 years and the risk of a sentence below 5)." *Apprendi*, 530 U. S. at 422 (Thomas, J., concurring).

It is difficult to reconcile the Guidelines with this reasoning.

The Guidelines utilize a wide variety of aggravating and mitigating facts to determine an offense level and criminal history category. These are then used to find the presumptive sentence from the Sentencing Commission's sentencing table. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.3(e), pp. 738-739 (2d ed. 1999). Therefore, under the Guidelines facts not pled and proven beyond a reasonable doubt to a jury are used to aggravate the potential punishment. Although courts may impose a lesser or greater sentence than what the Guidelines presume, that departure must be independently justified, and is subject to appellate review, see *id.*, § 26.3(e), at 740-741; *Koon* v. *United States*, 518 U. S. 81, 96-100 (1996). This is not likely to satisfy an opinion overruling *McMillan*. The reasonable doubt requirement cannot be

avoided through the use of presumptions, even rebuttable ones. See *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979).

Amicus does not assert that all of these decisions and practices would necessarily be struck down if *McMillan* is overturned. At the very least, *stare decisis* could play an important role limiting the disruption. However, since any decision overturning *McMillan* must reject *stare decisis* in that case, any subsequent reliance on *stare decisis* will appear arbitrary.

If *McMillan* is overturned, this Court will be faced with the choice of a monumental change in sentencing law, strained attempts to distinguish the overturning decision, or the arbitrary use of *stare decisis*. This result could also threaten *Apprendi* in the long term. *Apprendi* caused considerable disruption, and was a 5-4 decision made over vigorous dissents. If given the expansive construction discussed in this section, rather than the narrow, literal reading discussed in part I A, then *Apprendi* will also be inconsistent with a large body of this Court's decisions. The resulting disruption will lead to ongoing litigation in order to determine how much modern sentencing law must be remade by this Court's decision.

One final virtue of *stare decisis* is that it helps preserve those decisions that rely on its virtues. If a court respects precedent, then it increases the chance that future courts will follow suit. See Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 71 (1991). The converse is equally true. Decisions that do not respect precedent will receive less deference. "When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of *stare decisis*." *Graham* v. *Collins*, 506 U. S. 461, 497 (1993) (Thomas, J., concurring). The best way to preserve *Apprendi* from future attack is to limit its current scope. This is consistent with the majority opinion, and will prevent a painful disruption of American sentencing law.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation